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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CHARLES CARTER,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT
AND
COMMISSIONER EDWARD V. WOODS,

Respondents.

Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner was an eight-year veteran of the Baltimore City Police Department when departmental disciplinary charges were brought against him. The departmental charges, which were brought pursuant to Maryland's Law Enforcement Officers' Bill of Rights [LEOBOR], Maryland Annotated Code, Article 27, Sections 727-734D (1992 Repl. Vol.), stemmed from criminal proceedings against Petitioner in the Circuit Court for Baltimore City, in which Petitioner received probation before judgment on a charge he violated Maryland statutory law by harassing his girlfriend.[1] Subsequent to Petitioner receiving probation before judgment a Police Department disciplinary hearing was conducted pursuant to the LEOBOR, in which the Police Department charged Petitioner with three departmental infractions, each of which could properly result in his termination as a police officer.[2] The three infractions were: 1) violation of a criminal statute; 2) failing to notify the Police Commissioner of criminal charges filed against an officer; 3) conducting oneself in a manner unbecoming of a police officer.

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[1] Probation before judgment, which is not considered a conviction in Maryland, is not available unless "a person accused of a crime pleads guilty or *nolo contendere* or is found guilty of an offense." Maryland Annotated Code, Article 27, Sec. 641 (1992 Repl. Vol.).

[2] The Police Commissioner of Baltimore City has discretion to discipline members of the department, including termination or any lesser punishment, for violating rules of conduct of the Department. Code of Public Local Laws of Baltimore City, Article IV, Section 16-7.

Based on evidence admitted during the departmental disciplinary hearing the departmental Trial Board found as a fact that all three administrative charges against Petitioner were proven, and the Trial Board recommended Petitioner's termination. The Police Commissioner accepted the Trial Board's recommendation as to sanction. Petitioner then sought judicial review of his termination in the Circuit Court for Baltimore City. The Circuit Court neither affirmed nor reversed the decision of the Police Commissioner to terminate Petitioner, but instead vacated that decision and remanded the matter back to the Trial Board for consideration *de novo*. The Circuit Court's review of the Trial Board hearing left it uncertain whether the Trial Board members and the Police Commissioner improperly considered Petitioner's probation before judgment for harassing his girlfriend as a conviction. The Circuit Court ruled that Petitioner could not be disciplined for violating a criminal statute based solely on the probation before judgment he received, and that the Police Department would have to prove the offense independently if it intended to maintain that charge.

On remand to the Trial Board, rather than conducting its own hearing into whether Petitioner harassed his girlfriend in violation of Maryland law, the Police Department elected to drop the administrative charge that Petitioner violated a criminal statute. The Police Department proceeded against Petitioner on the two remaining charges, and they were both sustained against Petitioner by the Trial Board, to wit: 1) failing to notify the Police Commissioner of criminal charges filed against him and 2) conducting himself in a manner unbecoming of an

officer. The Trial Board recommended a sanction of 30 days of suspension without pay on each charge, for a total of 60 days. The Police Commissioner accepted the Trial Board's recommendation and ordered Petitioner reinstated, with the reinstatement to be proceeded by a 60-day suspension without pay.

Petitioner again sought review in the Circuit Court. The Circuit Court affirmed the factual findings of the Trial Board and its conclusion that Petitioner was guilty of the two administrative charges against him. The Circuit Court reversed the Police Commissioner's decision to suspend petitioner for 60 days without pay, however, finding such a sanction arbitrary in light of the fact that Petitioner's employment with the Police Department had already been suspended for approximately one year without pay while Petitioner litigated the matter.[3] Significantly, however, the Circuit Court rejected Petitioner's assertion that he was entitled to an order of back pay from the date he was initially terminated following the first Trial Board hearing. Inasmuch as the second Trial Board hearing resulting in a proper finding that Petitioner violated two rules of the Police Department which both carried the permissible sanction of termination, the Police Commissioner was not required to reinstate Petitioner. The Police Commissioner's decision to extend

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[3] The Police Department did not appeal the Circuit Court's decision to reverse the 60-day suspension of Petitioner without pay. In light of the Court of Special Appeals' recognition that Petitioner could have been terminated for his infractions, since the Police Commissioner has discretion to chose the appropriate sanction, it is likely that an appeal by the Police Department would have been successful.

leniency to Petitioner, however, by reinstating him, did not obligate the Police Department to provide Petitioner with back pay from the initial date of his separation from employment.

Petitioner appealed to the Court of Special Appeals of Maryland, which affirmed. In that Court Petitioner raised two issues:

> 1. Does the withholding of salary, benefits, and seniority, without a hearing, to which an employee has a vested right, constitute a violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the Law Enforcement Officers' Bill of Rights?
>
> 2. Are wrongfully discharged employees entitled to relief in the form of back pay and seniority?

With regard to the first issue, the Court of Special Appeals held that Petitioner "had his hearing on the issues involved as required under . . . the LEOBOR and the due process clause of the Fourteenth Amendment." (Pet. App. 10). Those issues were whether Petitioner failed to notify the Police Commissioner of criminal charges filed against him and whether he conduced himself in a manner unbecoming of a police officer. Regarding the sanction imposed, and the decision of the Police Commissioner not to award Petitioner back pay for the period of time during which he was in effect suspended from employment, the Court recognized that "[i]t was wholly within the discretion of the Police Commissioner to terminate [Petitioner], on the basis of the charges other than violation of a criminal statute," and that "[t]he

determination to reinstate [Petitioner], but without back pay, instead of terminating his employment, was a decision entirely within the Commissioner's discretionary authority." (Pet. App. 12-13).

With regard to the second issue the Court held as follows:

> [Petitioner's] last argument is based on the faulty premise that he was wrongfully discharged. He was not. As an effect of the administrative and judicial proceedings, [Petitioner] performed no services for the Department for about a year. Since it was within the discretion of the Police Commissioner to terminate or otherwise punish [Petitioner], there was nothing inappropriate or illegal in the decision to reinstate [Petitioner] but not pay him for the time he was not working. In effect, he was suspended from that period of time, not fired.

(Pet. App. 13).

Petitioner sought review of the decision of the Court of Special Appeals by the Court of Appeals of Maryland. The Court of Appeals denied certiorari. (Pet. App. 14).

REASONS FOR DENYING THE WRIT

There are no special and important reasons for the Court to grant certiorari in this case. The court below has not decided a federal question in a way that conflicts with the decision of another state or federal court. Indeed, if this Court were to grant the petition it undoubtedly would be forced to later dismiss it as having been improvidently granted since the Question Presented

is one which was not the raised nor decided in the Court of Special Appeals; nor is the Question Presented expressed in the terms and circumstances of the case. This case does not involve an important question of federal law which has not been, but should be, decided by the Supreme Court. Rather, the Petition for Certiorari is nothing more than an unsuccessful attempt to show that the decision below was erroneous.

As he did in the Court of Special Appeals, Petitioner continues to baldly assert that he was "improperly terminated." He purports to sue to enforce the right of a wrongfully terminated employee to reinstatement and back pay. One may assume *arguendo* that an employee who is wrongfully terminated from public employment is entitled to reinstatement and back pay to the date of discharge, but that has nothing to do with Petitioner's case. Petitioner was not wrongfully terminated. Petitioner violated rules of conduct promulgated by his employer, for which his employment could have been terminated. Rather then terminating his employment Petitioner's employer punished him with a suspension without pay for approximately one year. Thus, insofar as this case is concerned, the question is not whether an employee who was wrongfully discharged is entitled to reinstatement and back pay, but rather whether an employee who has committed employment infractions warranting discharge is nevertheless immune from punishment. Of course the answer to the latter question is no, as recognized by the Court of Special Appeals. There is simply no support for an argument that Petitioner's due process rights were violated.

The requirements of the due process clause, as they pertain to the instant case, were satisfied. Petitioner received notice of the administrative charges against him, and was given a full evidentiary hearing on those charges. The procedural rights Petitioner was afforded more than satisfied the due process clause. *Cleveland Board of Education v. Loudermill,* 470 U.S. 552 (1985). Although Petitioner cites *Carey v. Piphus,* 435 U.S. 247 (1978) and *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975), neither of those cases are relevant to the instant case. *Carey* discusses the measure of damages when an individual's procedural due process rights have been violated. *Carey* is inapposite because Petitioner's procedural due process rights were adhered to. *Moody* discusses what standards a federal district court should follow in deciding whether to award or deny back pay when an employee or applicant for employment has lost the opportunity to earn wages because an employer has engaged in a discriminatory employment practice in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000(e) *et seq. Moody* is inapposite because Petitioner was not the victim of an unlawful employment practice.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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January 1993